



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Daniel R. Beerck, Associate Legal Counsel
The Ohio State University
1590 N. High Street, Suite 500
Columbus, OH 43201-2178

JUN 26 2009

RE: MUR 6111
WOSU Public Media

Dear Mr. Beerck:

On November 27, 2009, the Federal Election Commission notified WOSU Public Media of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). On June 22, 2009, the Commission found, on the basis of the information in the complaint and information provided in WOSU Public Media's response, that there is no reason to believe WOSU Public Media violated the Act. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Wanda D. Brown, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: WOSU Public Media MUR: 6111

I. BACKGROUND

The complainant in this matter alleges that WOSU Public Media ("WOSU") acted as a "political action group" when it cosponsored a debate on October 16, 2008 featuring three candidates for Ohio's 15th District U.S. Representative seat, but excluded Libertarian candidate Mark Noble. The Complainant suggests that the debate was tantamount to a financial contribution to, or an expenditure on behalf of, the participating candidates because the debate gave them "preferential exposure," and asserts that WOSU "should be required to [register with the Commission] and file the required forms." Further, the Complainant maintains that the participating candidates should report the alleged in-kind contribution in disclosure reports filed with the Commission. The Commission received a supplement to the original complaint on January 6, 2009 raising "new facts" supporting the original allegations, including that WOSU broadcast a radio "call-in show" on October 30, 2008 with the same three candidates that participated in the debate. The supplement also noted that Mr. Noble polled over 10,000 votes in the general election demonstrating that he was a serious candidate.

Respondent WOSU argues that it acted legally because it determined eligibility for participation in the debate based upon objective criteria outlined in a predetermined policy, and explained that Noble was not invited to participate because he did not meet those criteria. WOSU submitted a copy of its debate guidelines regarding the inclusion of third-party candidates in political debates to demonstrate that its eligibility criteria are based on indicators of electoral support and are viewpoint neutral. WOSU explains that

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the guidelines seek to ensure that voters "see and hear as much as possible from candidates who have a legitimate chance of being elected." WOSU Response at 4. The selection criteria require that a candidate is: (1) a legally qualified candidate that has publicly announced his/her intention to run for the office and qualified for the ballot, or actively campaigning as a write-in candidate (demonstrated by having a staffed campaign headquarters and receiving press coverage), and (2) has received at least five percent or more of support in a professionally conducted public opinion survey by an independent pollster. WOSU Response attachment A; *see also* Complaint Attachment A.¹ WOSU noted that Mr. Noble did not reach the 5% polling threshold and thus was not invited on that basis. However, WOSU also points out that one third party candidate met the 5% requirement and participated in the debate.

WOSU submitted no additional response when provided with a copy of the Complaint supplement alleging that the October 30, 2008 radio program also resulted in expenditures. However, according to the Complainant, when a caller asked why Noble was excluded from the radio show during the show itself, the host read WOSU's policy

¹ The selection criteria submitted by WOSU in its response is slightly different from that submitted by Columbus Metropolitan Club ("CMC"), the debate co-sponsor, even though CMC purports to be submitting WOSU's policy. For instance, CMC lists submission of campaign finance reports filed with a government agency as an objective criterion to measure candidate viability, while WOSU does not. Nevertheless, it appears that the minor differences between the criteria submitted by each are not material to our analysis here. In addition, the criteria submitted by both WOSU and CMC appear to apply only to third party candidates. It is not clear whether there are separate criteria for major party candidates that were not submitted to the Commission or whether there are no selection criteria for major party candidates and they are automatically invited to the debate. For general election debates, staging organizations cannot use nomination by a particular party as the sole objective criterion to determine debate eligibility. *See* 11 C.F.R. § 110.13(c). Nevertheless, information in the complaint responses indicates that the major party candidates met the selection criteria used for third party candidates (e.g. 5% polling threshold, ballot access). For instance, at the time of the debate, the two major party candidates had polled 47% and 42%, respectively, in public support.

regarding candidate debate selection to explain how the call-in show's guest list was derived.

Based on all available information, the Commission found no reason to believe that WOSU violated the Act by making prohibited contributions to, or expenditures on behalf of the candidates participating in the debate in question, or by failing to register with the Commission and file disclosure reports, and closed the file as to both Respondents.

II. FACTUAL AND LEGAL ANALYSIS

In anticipation of the November 4, 2008, general election, WOSU and the Columbus Metropolitan Club ("CMC") entered into an agreement to cosponsor a debate featuring candidates vying for Ohio's 15th District U.S. Representative seat. Under the agreement, CMC was to promote attendance, gather reservations, help with set design and collect and screen questions to be asked at the debate. WOSU was to choose the participating candidates and to host and broadcast the debate.

WOSU invited three candidates to participate in the debate on October 16, 2008. In addition, the same candidates participated in a WOSU Radio open line call-in show on October 30, 2008. It appears that the participating candidates for each of these events were chosen pursuant to WOSU's policy regarding political debates, implemented in March 2008. According to WOSU's debate policy, candidates demonstrating a measurable chance of election, defined as those receiving at least five percent support in a poll or public opinion survey conducted by an independent organization, would be included. Candidates not receiving the requisite support would be excluded because, according to the policy, "such participation will hinder the

audience's understanding of the positions held by candidates who have a legitimate chance of winning election (sic)." WOSU Response at 2.

On October 8, 2008, Mr. Buckel, the complainant in this matter, phoned WOSU regarding Noble's exclusion from the scheduled debate. WOSU explained that Noble had been excluded because he had failed to receive the requisite five percent support. It also provided a copy of its policy regarding political debates in a letter sent to Mr. Buckel the same day. Subsequently, Mr. Buckel filed his complaint with the Commission.

A. WOSU Public Media Did Not Violate the Act

1. Debate

The Commission's regulations provide that "[b]roadcasters (including a cable television operator, programmer, or producer), *bona fide* newspapers, magazines and other periodical publications may stage candidate debates in accordance with [section 110.13] and 11 C.F.R. § 114.4(f), provided they are not owned by or controlled by a political party, political committee or candidate." 11 C.F.R. § 110.13(a)(2). In its Response, WOSU explains that Ohio State University owns and operates WOSU, and as an instrumentality of the State of Ohio, it is not controlled by any candidate, political party or political committee. The organization operates a public radio and television station in Columbus, Ohio, and is a member station of the Public Broadcasting System (PBS). Thus, as a broadcaster, WOSU may sponsor candidate debates pursuant to section 110.13(a)(2) without making a contribution or expenditure to the extent that it complies with the rules in sections 110.13(b) and (c). See MUR 6072 (Northland Regional Chamber of Commerce, *et al.*). At the debate in question, it appears that WOSU complied with the Commission's debate staging criteria at 11 C.F.R. § 110.13(b) and (c)

by including at least two candidates and not promoting one of them over the other, and by selecting debate participants based on pre-established, objective criteria.

Accordingly, because WOSU complied with the requirements at 11 C.F.R. § 110.13, the Commission found no reason to believe that WOSU Public Media violated the Act by failing to register with the Commission and file disclosure reports or by making prohibited and unreported contributions to, or expenditures on behalf of, the candidates participating in the debate.

2. Radio Call-In Show

The Act defines “contribution” and “expenditure” to include any gift of money or “anything of value” made for the purpose of influencing any election for Federal office, but excludes any cost “incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer, or producer), ... unless the facility is owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. § 431(8)(A)(i), (9)(A)(i), and (9)(B)(i); 11 C.F.R. §§ 100.52, 100.73, 100.111(a), and 100.132. This exclusion is known as the “press exemption.” or “media exemption.” The term “anything of value” includes in-kind contributions. 11 C.F.R. § 100.52(d)(1).

In applying the press exemption, the Commission first asks whether the entity engaging in the activity is a “press entity” within the meaning of the Act and the Commission’s regulations. In determining whether an entity is a press entity, the Commission has focused on whether it is in the business of producing on a regular basis a program that disseminates news stories, commentary, and/or editorials. *See* Advisory

Opinions 2008-14 (Melothe, Inc.), 2007-20 (XM Satellite Radio Inc.), and 2005-19 (The Inside Track). Second, the Commission, in determining the exemption's scope, asks (a) whether the press entity is owned or controlled by a political party, committee, or candidate; and, if not, (b) whether the entity was functioning within the scope of a legitimate press entity at the time of the alleged violation. If the press entity is independent of any political party, committee, or candidate, and if it was acting as a legitimate press entity at the time of the alleged violation, it is exempt from the Act's restrictions on corporate contributions and expenditures, and the Commission's inquiry should end. *See Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinions 2008-14 (Melothe, Inc.), 2005-19 (The Inside Track), and 2005-16 (Fired Up!).

The complainant seems to suggest that the radio call-in show was another debate featuring the same candidates that participated in the previously televised debate and that, once again, WOSU wrongfully excluded Noble from this debate. According to the complaint, the host of the radio program even cited the WOSU debate selection criteria during the radio broadcast in response to a question concerning Noble's exclusion from the program. Notwithstanding whether this was a "debate," it appears that the radio show was a press activity and is therefore exempt from the definition of expenditure or contribution by the "press exemption."

WOSU Radio is a press entity because it regularly produces and airs news stories and talk shows. In addition to local programming such as the debate in this matter, WOSU airs numerous national news and public affairs programs including "On Point," "On the Media," "Talk of the Nation," and "Weekend Edition."

<http://www.wosu.org/radio/> (last viewed June 9, 2009). Further, WOSU specifically denies that it is owned or controlled by any political party, political committee, or candidate, and neither the complaint nor the available evidence suggests otherwise. Finally, the October 30, 2008 radio call-in show constituted legitimate press activity. It featured political candidates which answered questions from listeners regarding the candidates' positions regarding issues of local importance. The fact that the program featured political candidates is not dispositive, because featuring interviews of candidates on-air falls within the bounds of the press exemption. See, e.g., MUR 5569 (John and Ken Show).

Accordingly, because the alleged activity in this matter falls within the press exemption, the Commission found no reason to believe that WOSU Public Media violated the Federal Election Campaign Act of 1971, as amended, by making prohibited and unreported contributions to, or expenditures on behalf of, the candidates participating in the radio call-in show, and close the file.